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84-637

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CATHERINE PETERSON,
Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTION PRESENTED

Whether ethical requirements preclude non-profit organizations from recovering statutory attorney's fees at market rates for the services of in-house salaried counsel, where all of the fees are placed in a fund used solely to provide legal services.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No.

CATHERINE PETERSON,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The National Treasury Employees Union, on behalf of Catherine Peterson, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The orders of the court of appeals (App., *infra*, 1a-2a) summarily affirming the decision of the Merit Systems Protection Board and denying petitioner's motion for hearing *en banc* are unreported. The opinion of the Merit Systems Protection Board (*id.* at 3a-17a) is reported at 84 F.M.S.R. 7003. The opinion of the presiding official of the MSPB (*id.* at 18a-26a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 19, 1984. A motion for hearing *en banc* was denied

on August 9, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1251(1).

STATUTORY PROVISIONS INVOLVED

5 U.S.C. 7701(g)(1) provides:

> "Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case, may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee, as the case may be, determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

STATEMENT

1. Petitioner Catherine Peterson is a federal employee who was the prevailing party before the Merit Systems Protection Board in an appeal of an adverse personnel action pursuant to the Civil Service Reform Act. Peterson was represented in her appeal by a salaried staff attorney provided by her union, the National Treasury Employees Union.

The National Treasury Employees Union (NTEU) is a non-profit association that functions as a federal sector labor organization pursuant to the Civil Service Reform Act, 5 U.S.C. 7101 *et seq.* In addition to attorneys and non-lawyer field representatives, NTEU employs lobbyists, public relations employees, insurance specialists and support staff.

As one of its services, NTEU provides attorneys to members like Peterson in personnel-related proceedings

under the Civil Service Reform Act ("CSRA"). NTEU employs salaried staff attorneys to litigate these individual cases and to litigate collective federal employee rights before administrative and judicial tribunals.

All attorney fees recovered by its salaried staff attorneys are paid to the NTEU Legal Services Program. None of the fees are commingled with the union's general revenues. The funds from the Legal Services Program are used solely to pay the actual expenses of providing legal services. None of the funds are used to accomplish other NTEU goals.

2. In the instant case, an NTEU attorney successfully represented petitioner Catherine Peterson before the MSPB. In adjudicating Peterson's complaint, it was determined (App., *infra*, 20a-21a) that her employer, the Department of Energy, had harassed her and had initiated a removal action against her in bad faith.

After securing a reversal of Peterson's removal, NTEU's staff counsel sought an award of attorney fees under 5 U.S.C. 7701(g)(1) in the amount of $7,300. This amount was calculated by utilizing the prevailing market rate of $50 for each hour spent on the case. The presiding official held Peterson entitled to recover reasonable attorney fees under the statute "in the interest of justice." However, rather than basing the attorney fee award on prevailing market rates, the presiding official based the award upon NTEU counsel's hourly salary rate ($11.89) plus an equal amount for overhead. He therefore reduced the award by over fifty percent, to $3,526.68 App., *infra*, 21a-24a.

3. The full MSPB affirmed the reduction in attorney fees, in reliance upon one of its earlier decisions, *Wells v. Schweiker*, 12 M.S.P.B. 329 (1982). In *Wells*, the MSPB had ruled that ethical considerations forbidding the practice of "fee-splitting" precluded the use of a mar-

ket rate formula for union counsel. In support of its ruling, the *Wells* panel relied upon the holding of the D.C. Circuit in *National Treasury Employees Union v. Department of the Treasury*, 656 F.2d 848 (1981). In that case under the attorney fee provision of the Privacy Act, the D.C. Circuit had held that ethical principles prohibiting fee-splitting and the unauthorized practice of law prevented NTEU from recovering market rate fees and depositing them into its general revenues, where they could be used for any purpose.

At the suggestion of the panel decision in *NTEU v. Treasury*, *supra*, 656 F.2d at 855, NTEU and other public sector unions created separate legal services programs to solve the ethical problem. In *Wells*, the MSPB rejected this safeguard as insufficient, and held that market rate fees were still unavailable because of the prohibition against fee-splitting. Although the union in *Wells* could never use the funds received in attorney fee awards for any purposes other than litigation, the MSPB reasoned that an award in excess of its actual cost would profit the union by "reliev[ing] [it] of the burden of financing its litigation activities through its general revenue funds." 12 M.S.P.B. at 332.

4. In accordance with 5 U.S.C. 7703(b)(1), a petition for review was filed with the United States Court of Appeals for the Federal Circuit. The court of appeals (App., *infra*, 2a) summarily affirmed the MSPB's decision below on the basis of its ruling in a related case, *Goodrich v. Department of the Navy*, 733 F.2d 1578 (Fed. Cir. 1984), *petition for cert. filed*, No. 84-577, October 10, 1984. In *Goodrich*, the court of appeals endorsed the MSPB's decision in *Wells* that the ethical considerations discussed in *NTEU v. Treasury* precluded the award of market rate fees to NTEU. The Federal Circuit concluded that an indirect benefit to the union could create a fee-splitting problem. The court said: "By reducing the amount of its general funds the union is re-

quired to use to provide legal services, the payment to the fund of legal fees that exceed the union's expenses of providing the services would result in the union's indirectly utilizing legal fees for its ordinary expenses." 733 F.2d at 1580.

The Federal Circuit declined NTEU's request for hearing *en banc* in the intant case (App., *infra*, 1a).

REASONS FOR GRANTING THE PETITION

This case presents an issue of great concern to non-profit organizations that provide legal representation to persons vindicating important national statutory policies. Only last term, this Court unanimously ruled that when Congress used the phrase "reasonable attorney's fees" in a fee-shifting statute (the Civil Rights Attorney Fees Awards Act, 42 U.S.C. 1988) it intended the courts to determine *all* attorney's fees awards—including those to non-profit organizations employing salaried in-house counsel—with reference to prevailing market rates. *Blum v. Stenson*, — U.S. —, 104 S. Ct. 1541 (1984).

Contrary to that recent ruling and in direct conflict with the law of the D.C. Circuit, the Federal Circuit has interposed its own unprecedented and erroneous interpretation of the ethical prohibition against fee-splitting to limit such an organization—the National Treasury Employees Union—to less than prevailing market rates under an analogous fee-shifting provision, contained in the Civil Service Reform Act, 5 U.S.C. 7701(g)(1). The court's unprecedented decision not only undermines the attorney fee provision of the CSRA; its potentially boundless application has caused and will continue to cause NTEU, as well as the rest of the non-profit legal community, uncertainty as to how to safeguard their existing rights to recover market rate fees under other fee-shifting statutes. For all of these reasons, this Court should grant review.

1. The potentially boundless application of the Federal Circuit's ruling can scarcely be overestimated. Countless non-profit organizations employ in-house salaried counsel to conduct litigation on behalf of their membership and the public at large. The attorneys who work for these organizations usually accept below market rate salaries because they believe their employing organizations serve the public interest. *See, Wilderness Society v. Morton*, 495 F.2d 1026, 1037 (D.C. Cir. 1974), *reversed on other gds. sub. nom. Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975).[1]

Often, these non-profit groups are entitled to receive an award of attorney fees under a fee-shifting provision enacted to facilitate suits that vindicate important public policies.[2] In practice, the organizations allocate the attorney fee awards they receive in a number of different ways. But under the Federal Circuit's ruling, none of these organizations can know which methods of allocation will result in loss of existing rights to recover market rate fees and under which statutes. This is so because the court's ruling makes it impossible for these organizations to avoid the putative ethical problem of fee-splitting

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[1] The organizations that employ in-house salaried counsel at below market rate salaries include not only public sector unions like NTEU but also other non-profit groups that focus on a broad range of public issues, including civil rights (American Civil Liberties Union, NAACP Legal Defense Fund, Mexican American Legal Defense Fund); the environment (Environmental Defense Fund, National Wildlife Federation, National Resources Defense Council); consumer protection (Consumers Union); children's rights (Children's Defense Fund); and historic preservation (National Trust for Historic Preservation). This list of non-profit groups is obviously not exhaustive. For other non-profit organizations that employ salaried in-house counsel, see, Council for Public Interest Law, BALANCING THE SCALES OF JUSTICE: FINANCING PUBLIC INTEREST LAW IN AMERICA, Appendix C (1976).

[2] There are over 70 such fee-shifting statutes. See, Berger, *Court Awarded Attorneys' Fees: What is "Reasonable?"*, 126 U. Pa. L. Rev. 281, 303 & n. 104 (1977).

even if they arrange their finances, as NTEU has, to assure that the fees are used only for the provision of legal services and can never be shared for use in the organization's other activities.

The Federal Circuit's decision is particularly disturbing to NTEU and similar organizations because it conflicts directly with the law of the D.C. Circuit upon which they have relied in organizing their litigation programs to protect their rights.

In *National Treasury Employees Union v. United States Department of the Treasury*, 656 F.2d 848 (D.C. Cir. 1981), the court of appeals held that ethical principles concerning the sharing of fees with lay entities and the unauthorized practice of law, prohibited the award of market rate fees in a Privacy Act case successfully litigated by NTEU staff attorneys. The court refused to award NTEU market rate fees because the fees would go "into the union's general treasury." 656 F.2d at 852. Thus, the court reasoned, "the employing lay organization would capitalize on the attorney's services, reap a profit therefrom, and put the monies thus made to any use it chooses." *Id.* at 853.

The D.C. Circuit was nonetheless "sensitive to the danger of treading on associational or other constitutionally grounded rights" (656 F.2d at 852) and it specifically assured the non-profit legal community that the ethical problem would not arise in organizations whose fees "are plowed back into the litigation programs that made their recovery possible in the first place." 656 F.2d at 854. Contrasting NTEU's arrangement at that time, the court said, "there is no hint whatsoever that the sought after fees would be similarly devoted . . . so far as we know they would go toward enrichment of the union's coffers and support of its diverse operations." *Ibid.* The court suggested, without deciding, that for organizations such as NTEU, full fee awards might "withstand criticism when the monies are directed into a fund

for the maintenance of a legal services program." 656 F.2d at 855 (footnote omitted).

After this decision, NTEU followed the D.C. Circuit's suggestion and set up the NTEU Legal Services Program, a separate account into which all fees would be allocated, to be used solely for funding litigation. The propriety of this practice was confirmed by the D.C. Circuit one year later in *Jordan v. Department of Justice*, 694 F.2d 514 (1982).

In sanctioning an award of market rate fees to the Institute for Public Representation in *Jordan*, the court specifically said that a lay entity such as the Institute, that places its portion of an attorney fee award in a "fund dedicated solely to litigation," would not be engaged in the division of fees prohibited by the ethical considerations discussed in *NTEU v. Treasury*. Chief Judge Robinson, author of the opinion for the court in *NTEU*, also wrote the opinion for the court in *Jordan*. He explained that his opinion for the court in *NTEU* had held only "that it is improper for an entity not licensed to practice law to partake in attorneys' fees representing the market formula . . . *where its portion is not to be placed in a fund dedicated solely to litigation*." 691 F.2d at 516, n.14 (citations omitted) (emphasis added).[3]

2. The import of the Federal Circuit's unexplained, unprecedented, and contrary ruling in this case is that

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[3] *NTEU v. Treasury* and *Jordan v. Department of Justice* arose under the attorney's fees provisions of the Privacy Act and the Freedom of Information Act. Because the Federal Circuit has exclusive jurisdiction over appeals from the Merit Systems Protection Board (see 5 U.S.C. 7703(b)(1), 28 U.S.C. 1295(a)(9)), it is the only court of appeals that will decide the circumstances under which market rate fees may be recovered under 5 U.S.C. 7701(g)(1). The conflict presented here is the only kind that can arise in light of this grant of exclusive jurisdiction. Resolution of the conflict is warranted now because there can be no further development of the law under 5 U.S.C. 7701(g)(1).

it is unethical to use attorney fee awards from one case to finance future litigation. NTEU's Legal Services Program is on precisely the same footing as any other legal enterprise in which fees obtained in some cases subsidize legal work in other, similar cases. The Federal Circuit's decision warrants review because the ethical underpinnings of this widespread practice have always been assumed, *e.g.*, *Blum v. Stenson*, *supra*, and because its prohibition is unjustified by the language or rationale of the fee-splitting rule.

The ethical rule at issue here is that a lawyer "shall not share legal fees with a non-lawyer." Rule 5.4(a), American Bar Association Model Rules of Professional Conduct (1983). Manifestly, where an organization maintains a separate litigation account, as does NTEU, the legal fees are not "shared." Indeed it is precisely the purpose of NTEU's separate account to avoid such sharing, and, as the D.C. Circuit ruled, the separate account cures any possible ethical problem.

Even assuming NTEU somehow benefits indirectly when the legal services program obtains funds to be used in future litigation,[4] the fee-splitting rule's rationale does

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[4] We note at this juncture that the Federal Circuit's description of even the *indirect* benefit NTEU could receive if market rate fees were recoverable is somewhat overstated. In *Goodrich*, the court concluded that "the amount of its general funds the union is *required* to use to provide legal services" would be reduced if the Legal Services Program recovered above-cost fees. 733 F.2d at 1580 (emphasis added). But NTEU is not *required* to provide attorneys to individual employees or to represent their collective interests in litigation. There is simply no obligation to be relieved.

Further, the Federal Circuit's suggestion in *Goodrich* that a different result might obtain if the legal representation fund fully supported the union's legal program (733 F.2d at 1581), underscores the illogic of its "indirect benefit" discussion generally. It is difficult to understand how the union would be any less "benefitted" if it were able to rely completely upon the fund to pay the expenses of litigation. If anything, the "benefit" would be greater.

not justify extending its prohibitions beyond actual sharing of fees by a lay organization to a prohibition of speculative and indirect benefits to such an organization. The rule's purpose is "to protect the lawyer's professional independence of judgment." Comment, Rule 5.4, A.B.A. Model Rules of Professional Conduct (1983). That independence would presumably be threatened if a layperson shared an interest in profit with the attorney, without sharing an interest in the client's fate. In such situations the layperson, who is not bound by the Canon of Ethics, might exert pressure on the lawyer in the interest of profit and to the detriment of the client.

Where fees are plowed back into the legal services program, for use only in that program, there can be no possibility that the other more generalized goals of the union will come between the lawyer and the client. The benefit to the union is far too indirect. Moreover, in cases in which NTEU provides legal services, the union's interest and that of the client, who is a union member, are completely aligned. Cf. *NAACP v. Button*, 371 U.S. 415, 443 (1963) (noting that there is no danger of NAACP compromising interests of litigants its attorneys represent because "the aims and interests of NAACP have not been shown to conflict with those of its members and nonmember Negro litigants"). NTEU is a non-profit organization which has no interest in making a profit from its legal services. In similar contexts, this Court itself has rejected the notion that the likelihood of indirect financial benefit to a non-profit organization would lead to lay interference with the attorney-client relationship. In *In Re: Primus*, 436 U.S. 412, 431 (1978), this Court recognized that any financial benefit the ACLU would receive from attorney fees "offers no basis for equating the work of lawyers associated with the ACLU or the NAACP with that of a group that exists for the primary purpose of financial gain through the recovery of attorney fees." *See also, NAACP v. Button, supra*, 371 U.S. at 443.

The total inapplicability of the fee-splitting prohibition to this case is highlighted by the fact that the Federal Circuit's holding is contrary to the results in countless decisions where market rate fees have been awarded to counsel employed by umbrella lay organizations. In those decisions, as here, the amount of general revenues the organizations would need to use to finance future legal services would be reduced by an award of above-cost fees. Yet none of these decisions even mention the ethical problem the Federal Circuit unearthed in this case.[5]

The court's ruling here is contrary as well to the position taken by the Attorney General in a memorandum dated February 29, 1980 (App., *infra*, 27a-29a), discussing the D.C. Circuit's initial ruling in *Anderson v. Department of Treasury*, 648 F.2d 1 (1979), which was later reaffirmed in *NTEU v. Treasury*, *supra*. In that widely-circulated memorandum, which is part of the record in this case, the Attorney General concluded (inconsistent with the position of the government in this case) that the fee-splitting problem would be solved by a separate operating account, used solely to finance future litigation.

3. The court below not only misconstrued ethical requirements, it erred in failing to determine the amount of fees to be awarded solely by reference to the standards Congress provided under the CSRA. The Act states simply that "reasonable attorney's fees" are recoverable, and it does not differentiate between in-house and hired counsel.

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[5] See cases listed in Appendix, *infra*, at 30a-31a.

The only case we have found which mentions ethics at all is *McClean v. Arkansas Board of Education*, 723 F.2d 45, 47 (8th Cir. 1983). In that case the court found that the defendant's argument—that it would be unethical to award full fees to the ACLU—did not even merit comment.

In *Blum v. Stenson, supra*, this Court observed that resolution of whether a market rate or cost related standard is applicable where the prevailing plaintiff is represented by a non-profit organization "begins and ends with an interpretation of the attorney's fees statute." —— U.S. at ——, 104 S. Ct. at 1546. The statute at issue in *Blum*, the Civil Rights Attorney's Fees Awards Act of 1976, like the provision at issue here, authorized the award of a "reasonable attorney's fee." The Court held that Congress intended a market rate standard to apply, regardless of who represented the plaintiff. It observed that Congress "was legislating in light of experience when it enacted the 1976 fee statute," that it intended the amount of fees to be governed by the same standards which prevail in other cases, and that none of the cases decided at the time had adopted a cost based approach. —— U.S. at ——, 104 S. Ct. at 1546 & n.10. On the contrary, reference to market rate was uniform in all cases. *Ibid.*

It is significant that Congress chose the same language for Section 7701(g)(1) it had always used in other fee provisions; it provided for a "reasonable attorney's fee" to prevailing employees. The legislative history underlying the attorney fee provision of the CSRA does not elaborate on the meaning of this standard. Accordingly, in the absence of some contrary indication of Congressional intent, it must be presumed that Congress was also "legislating in light of experience" in 1978 when it enacted the CSRA and when it used the same unqualified "reasonable attorney's fee" language it had used in so many analogous fee-shifting provisions, including the Civil Rights Attorneys' Fees Awards Act of 1976. Certainly, Congress must have been aware of the vital role union counsel would play under the CSRA, and it could easily have specified otherwise if it had intended to limit fees to union counsel. Cf. Equal Access to Justice Act, 5 U.S.C. 504(b)(1)(A) (imposing a cap on fees).

The court below attempted to distinguish *Blum* on two grounds. First, it said, the entire fee in *Blum* went to "a non-profit law office, the Legal Aid Society of New York," while in the present case "part of the fee would inure to the benefit of a non-legal organization, the union." *Goodrich, supra*, 733 F.2d at 1580. But the structure of the non-profit organization was not even mentioned as a consideration in *Blum*. This is significant because this Court was no doubt aware that other kinds of organizations, with organizational features similar to NTEU, such as the ACLU, would be entitled to receive market rate fees under *Blum*. Cf. *In Re: Primus, supra*, 436 U.S. at 414 n.2, 428 n.20, and 431 (describing lay activities of ACLU and noting it will benefit from attorney's fees awards). Moreover, neither this Court nor any lower courts have ever inquired into whether part of a fee would indirectly "inure to the benefit of a non-legal organization," even in the multitude of cases in which fees were awarded non-profit umbrella organizations like the ACLU, NAACP, and others.[6]

Second, the Federal Circuit said, *Blum* is different because the policy underlying the shifting of fees under the civil rights statutes is to encourage and facilitate the bringing of suit to vindicate civil rights. With no explanation, the court said it could discern "no comparable public policy under the CSRA." *Goodrich, supra*, 733 F.2d at 1580-1581.

The court's reasoning is deeply flawed. The very existence of a fee-shifting provision, which is a departure from the normal American Rule, demonstrates Congressional intent to facilitate the bringing of suit. It is entirely reasonable that Congress has discerned a public interest in safeguarding employee rights under the CSRA which is not different in kind from the public interest in preventing violations of an individual's civil

[6] See cases listed in Appendix, *infra*, at 30a-31a.

rights. Thus, vindicating an individual employee's rights under the CSRA also vindicates the public's interest in the integrity of its civil service system.

In *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 269 (1975), this Court held that it is not the province of the judicial branch to pick and choose amongst national policies to determine which statutes are most important, and under which a judicial exception to the American rule should be created. The Federal Circuit has embarked on precisely that forbidden course here. It has interpreted identical language to mean market rate under one statute and cost under another, by the device of weighing the relative importance of each statute's policies. This approach is as standardless as the court-created private attorney general exception to the American rule, condemned in *Alyeska Pipeline*.

For these reasons, the distinctions the lower court contrived to justify its holding in light of this Court's contrary ruling in *Blum* are unsupportable. In truth, the Federal Circuit has departed from the teachings of *Blum* and created a brand new unjustified barrier to the recovery of market rate fees by non-profit organizations.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October, 1984

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 84-1035

DC07528090165ADD

CATHERINE L. PETERSON,
Petitioner,

v.

THE MERIT SYSTEMS PROTECTION BOARD,
Respondent.

JUDGMENT

On Appeal from the
Merit Systems Protection Board

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED: Motion of respondent for summary affirmance granted and decision of the Merit Systems Protection Board AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ George E. Hutchinson
GEORGE E. HUTCHINSON
Clerk

DATED July 19, 1984

Petitioner's request for reconsideration, Denied, August 9, 1984; Petitioner's Suggestion for hearing in banc, Declined, August 9, 1984.

Issued as a Mandate: August 20, 1984

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 84-1035

CATHERINE L. PETERSON,
Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent.

ORDER

Before MARKEY, *Chief Judge,* FRIEDMAN and RICH, *Circuit Judges.*

Upon consideration of respondent's motion for summary affirmance, the record in this case, and this court's decision in *Goodrich* v. *Department of the Navy,* No. 83-1363 (Fed. Cir. May 9, 1984) (petition for rehearing denied and suggestion for in banc rehearing declined July 12, 1984), it is hereby

ORDERED that the decision of the Merit Systems Protection Board is affirmed.

FOR THE COURT

/s/ Howard T. Markey
HOWARD T. MARKEY
Chief Judge

19 July 84
Date

APPENDIX B

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

Docket Number DC07527990039ADD

GASTON POWELL, JR.

v.

DEPARTMENT OF THE TREASURY

Docket Number AT531D8090008ADD

LORINE OVERTON

v.

DEPARTMENT OF THE TREASURY

Docket Number AT04328090001ADD

JIMMY PRICE

v.

DEPARTMENT OF THE TREASURY

Docket Number DC07528090165ADD

CATHERINE PETERSON

v.

DEPARTMENT OF ENERGY

Docket Number SL07528010095ADD

KATHERINE PETERSON

v.

DEPARTMENT OF THE TREASURY

OPINION AND ORDER

Each of the above-captioned cases is before the Board upon petition for review of the presiding official's addendum decision on the rate of attorney fees to be awarded a salaried union staff attorney for successfully representing the appellant before the Board.[1] Except in the case of appellant Katherine Peterson, the agency does not contest the presiding official's finding that a fee award is appropriate. Because these cases raise similar issues of law, they are hereby consolidated for disposition pursuant to 5 U.S.C. § 7701(f) and 5 C.F.R. § 1201.36(a).

The Office of Personnel Management (OPM) has intervened, pursuant to 5 U.S.C. § 7701(d)(1) in the cases of appellants Gaston Powell and Katherine Peterson. OPM's participation in those cases is limited to its challenge to the presiding official's award of market-value rate attorney fees.

In *Wells* v. *Schweiker*, MSPB Docket No. HQ120500017 at 5, 10 (December 6, 1982), the Board considered and adopted the recommended decision of Chief Administrative Law Judge John J. McCarthy holding that an award of attorney fees to salaried union attorneys should be based on a " 'salary-plus-overhead' or 'cost-plus' formula."[2] That formula is derived from "the hourly wage at which the union compensates its attorneys for time devoted to the case, plus overhead." *Id.* at 5. Under the cost plus formula, the fee is "determined by multiplying

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[1] All the attorneys here involved were, at the time they represented the appellants, employees of the National Treasury Employees Union (NTEU).

[2] The Board noted that, in arriving at that recommendation, the Administrative Law Judge relied on the Board's decision in *Powell* v. *Department of the Treasury*, MSPB Docket No. DC075299039 (October 2, 1981), which in turn relied on *National Treasury Employees Union* v. *Department of the Treasury, Internal Revenue Service*, 656 F.2d 848 (D.C. Cir. 1981). *Wells, id.* at 5.

the product of the hours reasonably worked times an hourly rate which is based on the attorney's salary, and adding to that product the overhead costs of providing the legal representation." *Id.* at 9. Overhead costs are determined to be an amount equal to the attorney's compensation. *Id.* at 9 n.4. *See also Powell v. Department of the Treasury*, MSPB Docket No. DC075299039 at 15-16 (October 2, 1981).

In *Wells, supra*, at 7, the Board also considered the proper formula for an award of attorney fees where the fees would not be directly deposited in the union's treasury but would be deposited in a separate legal representation fund created by the union. The Board, agreeing with the administrative law judge, rejected the union's contention that such a fund would warrant the same treatment as accorded legal services firms and charitable public-interest organizations for the purpose of applying the market-value rate attorney fees. *Id.* The Board concurred that application of the market-value rate 'would relieve the union, *pro tanto*, from the burden of financing its litigation activities by allocating funds from its general revenues [and would allow it] . . . to profit indirectly from that which it could not do directly.' *Id.* at 7-8, quoting *from* Recommended Decision HQ120500017 (October 8, 1981). Thus, the Board held that the cost-plus formula must apply even where the attorney fees to be awarded would be deposited in a union legal services fund. *Id.* at 8-9.

Gaston Powell v. *Department of the Treasury*

In this case an award of attorney fees was initially made to the union attorney in the presiding official's addendum decision dated October 29, 1979. The agency petitioned for review of that decision. By Opinion and Order dated September 18, 1980, the Board remanded the case to the presiding official for readjudication in light of its guidelines for awarding attorney fees set

forth in *Allen* v. *U.S. Postal Service*, 2 MSPB 582 (1980); *O'Donnell* v. *Department of the Interior*, 2 MSPB 604 (1980); and *Kling* v. *Department of Justice*, 2 MSPB 620 (1980).

Applying the guidelines enunciated in those cases, the presiding official issued a new addendum decision finding that the criteria had been met for an award of attorney fees. Also, the presiding official found that the 63 hours of time charged for work on the case was reasonable and that in view of the $70.00 to $90.000 per hour charged by experienced private attorneys in that specific geographical area, a $50.00 per hour market-value rate was also reasonable.

By Opinion and Order dated October 2, 1981, the Board remanded the case to the presiding official in light of the recent court decision in *National Treasury Employees Union*, *supra*, to determine whether the fee awarded would be retained solely by counsel or whether counsel was required to turn it over to the union. The Board stated that if the fee award was to be retained by counsel alone, the market value of the attorney's services should be awarded under *Kling*, *supra*. *See Powell*, *supra*, at 13. If, however, the attorney was required to turn the fee over to the union, the amount of the award should not exceed the cost incurred by the union in providing the legal services. *Id.* at 14.

On remand, the presiding official found in an addendum decision dated January 29, 1982, that the union attorney was entitled to the market rate fee since he was obligated to turn over the fees to a legal services program established by the union. Consequently, the presiding official awarded a total fee of $5,790.00 at the rate of $50.00 per hour for 63 hours of work plus $60.00 per hour for 44 additional hours of work.[3] OPM and the agency chal-

[3] The higher $60.00 per hour market-value rate reflects the attorney's increased legal experience.

lenge the presiding official's award of the market-value rate fees based on the union's establishment of the legal services program.

Because of our holding in *Wells, supra,* at 8-9, that where a salaried union attorney is required to turn over an award of attorney fees to the union the cost-plus formula must be applied, irrespective of whether the fees are to be deposited in a union legal services fund, we find that the presiding official erred in applying the market-value attorney fees rate.

Therefore, the petition for review is hereby GRANTED, and the case is REMANDED to the Board's Washington Regional Office to determine the award of attorney fees based on the cost-plus formula set forth in *Wells, supra.*

Lorine Overton v. *Department of the Treasury*

In an addendum decision dated September 9, 1981, the presiding official in this case awarded market-value attorney fees to appellant's salaried union attorney in the amount of $1,125.00 for 22.5 hours of work at $50.00 per hour. In applying the market-value rate, the presiding official noted that the union had established a legal services program fund and ordered the attorney either to place the fee awarded in the fund or to reimburse the union for compensation she received. Pursuant to *Wells, supra,* at 7-9, we find that the presiding official erred in applying the market-value rate attorney fees based on the union's establishment of a legal services program and absent any evidence that the attorney was entitled to retain the fee award.

Further, the agency contends that the presiding official erred in allowing attorney fees for the attorney's preparation of the motion for attorney fees. As to this contention, the Board has previously held that time expended by an attorney in pursuing legal fees may properly be included in a fee award. *LaMorge* v. *Department of*

Agriculture, 6 MSPB 125-126 (1981) (*citing Prandini* v. *National Tea Co.*, 585 F.2d 47, 52-53 (3d Cir. 1978)). Thus, the agency has failed to show error by the presiding official in this regard.[4]

Because of our finding that the presiding official erred in applying the market-value attorney fees formula without determining that counsel was entitled to retain the fee award, the petition for review is hereby GRANTED, and the case is REMANDED to the Board's Atlanta Regional Office. On REMAND the presiding official shall, consistent with *Wells*, *supra*, apply the market-value rate attorney fees if the award is to be retained solely by counsel, and the cost-plus rate if counsel is required to turn the award over to the union or to a legal services fund established by the union.

Jimmy Price v. *Department of the Treasury*

In an addendum decision dated August 11, 1981, the presiding official awarded the union attorney legal fees in the amount of $62.50 at the market-value rate of $50.00 per hour. The legal services were rendered in regard to a petition for enforcement of a Board decision and allegedly consisted of 15 minutes for filing the petition for enforcement, 30 minutes for providing argument in support of the enforcement order, and 30 minutes for filing an application for attorney fees.

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[4] The agency also alleges new and material evidence which, it asserts, establishes that the union attorney's actual wages were less than 25 percent of the awarded hourly market-value rate. In support of this allegation, the agency has submitted a Labor Organization Annual Report Form LM-2, received by the Department of Labor on January 7, 1981. The agency has failed to explain why this document was not submitted prior to the closing of the record by the presiding official. Consequently, the agency has failed to show that this document qualifies as new evidence under 5 C.F.R. § 1201.115(a). *See Avansino* v. *U.S. Postal Service*, 3 MSPB 308, 310-11 (1980). Nor, in view of our holding, would it be material.

The presiding official, relying on *O'Donnell* v. *Department of the Interior*, 2 MSPB 604, 611 n.10 (1980), awarded the market-value rate attorney fees, noting that there was no indication in the record "that the attorney fees are to go to the union." Addendum Decision at 3. However, the presiding official then ordered the union attorney either to place the fee in a union litigation fund or reimburse the union for compensation she previously received. *Id.* We find that the presiding official erred in awarding market-value [5] attorney fees without specifically determining whether counsel was obligated to turn over the fees awarded to the union or to a legal services fund established by the union.[6] *See Wells*, *supra*, at 7-9; *Powell*, *supra*, at 12, 17.

As in the case of appellant Overton, the agency contends that the union attorney should not be allowed to recover for time expended in preparation of the motion for attorney fees. However, as we found as to appellant Overton, there is no merit to this contention.

However, because we find that the presiding official erred in awarding the market-value rate attorney fees absent a specific finding as to whether counsel was a salaried employee and obligated to turn over the award to the union, the petition for review is hereby GRANTED, and the case is REMANDED to the Atlanta Regional Office for a determination as to whether the attorney fees

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[5] The agency also has submitted, as new and material evidence, a Labor Organization Annual Report, Form LM-2, to demonstrate that the union attorney's hourly salary was considerably less than the market-value rate. The agency has failed to explain why this document was not submitted to the presiding official prior to the closing of the record. Therefore, the submission of this document does not provide a basis for review as new evidence. *See Avansino*, *supra* at 310-11. Nor, in view of our holding, would it be material.

[6] In fact, we note that in response to the agency's petition for review in the instant case, the union attorney stated that "[f]ees received will be turned over to the NTEU Legal Services Program."

will be retained solely by counsel, in which case the market-value rate will apply, or will be turned over to the union, in which event, the cost-plus formula will apply.

Catherine Peterson v. *Department of Energy*

In this case the NTEU petitions for review of the presiding official's addendum decision dated October 22, 1981, awarding cost-plus attorney fees in the amount of $3,526.58 directly to the union's salaried attorney who represented appellant. The fee award was based on the attorney's hourly wage of $11.89 for 146 hours of work, and an equal amount for overhead, plus $54.80 in additional costs.

The union contends that since the attorney who represented appellant had left the employ of the union at the time the award of attorney fees was made, the presiding official erred in refusing to make the award directly to the union's legal services program. The union also contends that the presiding-official erred in failing to apply the fair market-value rate for the legal services rendered and in limiting the union's overhead costs to an amount equal to the attorney's salary without providing the union an opportunity to show actual overhead costs.[7]

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[7] In response to the petition for review, the agency urges that the addendum decision be affirmed. However, the agency also reiterates the contention made to the presiding official that NTEU, by failing to provide the dates of performance of each element of service by its attorney, failed to support the number of hours the attorney allegedly expended in representing appellant. The agency contends that even though the attorney was no longer employed by the union at the time the agency's motion for discovery was granted, the attorney should nevertheless be held liable for compliance with the order since he was directly awarded the attorney fees.

The presiding official found that the inclusion of specific dates as requested by the agency would have permitted closer scrutiny of the time claimed. However, he found that the claim of 146 hours was reasonable, noting that the case involved four days

Based on our holding in *Wells, supra*, at 8-9, we find that the presiding official properly applied the cost-plus formula in this case and correctly determined the union's overhead costs to be equal to the attorney's compensation. Further, we find that the presiding official appropriately awarded the attorney fees directly to the attorney rather than to the union. It has previously been held that an award of attorney fees should be made directly to attorneys rather than to the organization which employs them in order to avoid ethical concerns as to whether the organizations, by receiving fee awards, are engaged in the unauthorized practice of law. *See O'Donnell, supra* at 610 n.10, *citing to Wilderness Society* v. *Morton*, 495 F.2d 1026, 1037 (D.C. Cir. 1974), *rev'd on other grounds sub nom. Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975); *accord, National Treasury Employees Union, supra*, at 852. The organizations however, are entitled to reimbursement for expenses they incurred in providing the legal services. *O'Donnell, id.*

The union asserts that the creation of its legal services program, which is separate from the union's general treasury, eliminates any possible problems in regard to fee splitting between union attorneys and the union. In *Wells, supra*, at 8-9, the Board declined to treat a union legal services program in the same manner as legal services firms and charitable public-interest organizations for the purpose of awarding market-value attorney fees. We are not convinced that a different finding should obtain in determining the proper party to whom an award of

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of hearing, interviewing of 15 witnesses, an allegation of discrimination, the filing of a petition for review, and preparation of oral and written replies to the notice of proposed removal.

We find that the reasons stated by the presiding official were sufficient to find the hours claimed reasonable without requiring further compliance with the discovery order. Further, the agency has shown no prejudice to its rights. Therefore, we find no basis for disturbing the presiding official's finding on this issue. *See Karapinka* v. *Department of Energy*, 6 MSPB 114, 117 (1981).

attorney fees should be made. We find the court's reasoning in *National Treasury Employees Union, supra,* at 852, to be equally persuasive even where the union has established a legal services program. We therefore hold that an award of attorney fees to a salaried union attorney should be made directly to the attorney notwithstanding the existence of a legal services program established by the union.

Therefore, the petition for review of the presiding official's addendum decision date October 22, 1981, is hereby DENIED. 5 C.F.R. § 1201.115.

Katherine Peterson v. *Department of the Treasury*

Appellant was removed from her position as Tax Examiner with the Internal Revenue Service on the basis that she "associated with individual(s) known to be connected with illegal activities." The charge was supported by three specifications alleging appellant's "association" with each of three identified individuals. Appellant appealed her removal to the St. Louis Regional Office of the Board. The presiding official found only the first specification sustained. He further found that the sustained specification did not warrant removal and reversed the agency action. The agency has not petitioned for review of that decision, and it became final pursuant to 5 C.F.R. § 1201.113.

Appellant thereafter filed a motion for an award of attorney fees for legal services rendered by her union-appointed attorney. In an addendum decision dated June 2, 1981, the presiding official determined that appellant satisfied the requirements for an award of attorney fees under 5 U.S.C. § 7701(g)(1) by showing: (1) that attorney fees were incurred; (2) that appellant was the prevailing party; (3) that attorney fees were warranted in the interest of justice; and (4) that the fees requested were reasonable. He therefore awarded attorney fees in

the amount of $850.000 based on 17 hours of legal services at the market-value rate of $50.00 per hour.

The agency petitions for review of the addendum decision contending that the presiding official erred in finding that attorney fees were warranted in the interest of justice and in finding that the fees requested were reasonable.[8]

In support of her motion for attorney fees, appellant alleged that each of the foregoing circumstances existed in her case, and the presiding official found that appellant had so shown. The presiding official determined that the agency action against appellant was a prohibited personnel practice under 5 U.S.C. § 2302(b)(10) since appellant's association with the individual identified in the sustained specification was not shown to have harmed either appellant, her co-employees, or the agency. He further found that the agency's contention that appellant's association with that "individual might have caused her to attempt 'to secure confidential taxpayer information for illegal purposes' or might have endangered 'publice confidence in the integrity of the Internal Revenue Service' [was] sheerly speculative." Addendum Decision at 4. Based on the same determinations, the presiding official also found that the agency action was clearly without merit and wholly unfounded. Further, the presiding official noted that appellant had no means of knowing that the associations alleged were prohibited and that the agency never attempted to counsel appellant but, instead, immediately initiated the most severe disciplinary action possible. Also, based on his determination that only one of the specifications against appellant was sustained, the

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[8] Appellant alleges in her response to the petition for review that the agency petition is untimely based on the date of receipt by the Office of the Secretary. However, the Board's practice is to accept the postmark date as the date of filing. *See Beer* v. *Department of the Army*, 2 MSPB 226, 227 n.2 (1980). Using this standard, the agency petition is timely filed.

presiding official found that appellant was substantially innocent of the charges brought against her. He therefore found that attorney fees were warranted in the interest of justice.

The agency contends that the presiding official erred in finding prohibited personnel practice since he failed to make that specific finding in his initial decision. A prohibited personnel practice described in 5 U.S.C. § 2302(b) is an affirmative defense which must be raised and proved by appellant. *See* 5 U.S.C. § 7701(c)(2)(B). In the instant case, there is no evidence that appellant raised that defense in her petition for appeal, and it was not addressed by the presiding official in his initial decision. Moreover, appellant has presented no reason for failing to do so. Therefore, we find that appellant waived her right to subsequently rely on that allegation in support of her motion for attorney fees, and the presiding official erred in considering it in the addendum decision. *Cf. Wells* v. *Harris*, 2 MSPB 572, 574 (1989).

The agency also contends that the presiding official erred in finding that its action was clearly without merit and wholly unfounded and that appellant was substantially innocent of the charges brought against her. The agency asserts that appellant's association with the identified individuals violated a well-established agency rule; that the agency relied on statements made by appellant establishing her association with the individuals concerned; that one of the specifications was sustained; and that the presiding official noted that appellant had some limited acquaintance with the other two individuals.

However, the sustained specification proved only that appellant had an "association" or close personal relationship with one of the individuals alleged. The presiding official did not find, as the agency contends, that appellant had violated an agency regulation. We find that the mere fact that appellant admitted to the allegation that

she associated with the individual named in the first specification is not evidence upon which the agency should have reasonably relied in finding that appellant had violated the agency regulation concerned. Further, the presiding official found appellant's acquaintance with the other two individuals to be so limited that the agency could not reasonably have found that it amounted to proscribed association. In addition, the presiding official found that the regulation under which appellant was charged failed to define the term "association" and was "vague and overbroad in its reach." Initial Decision at 3, 4. The agency has not challenged that finding. Thus, we find that the agency has failed to show error in the presiding official's finding that its action was clearly without merit and was wholly unfounded.

Further, although the allegation of appellant's association with the individual named in the first specification was sustained, and appellant was found to have had a very peripheral acquaintance with the individuals named in the second and third specifications, appellant, nevertheless, was not shown to have engaged in improper conduct. Thus, appellant was substantially innocent of the charge against her. *Cf. Pattison* v. *Department of Agriculture*, MSPB Docket No. SE075209047 (October 8, 1981); *Smith* v. *Veterans Administration*, 3 MSPB 432, 433 (1980). Therefore, we find that the presiding official correctly determined that appellant was entitled to an award of attorney fees.

In determining the amount of attorney fees to be awarded, the presiding official applied the market-value formula, finding $50.00 per hour for 17 hours ($850.00) reasonable under the circumstances of this case. The record, however, indicates that the union attorney involved was obligated to turn over the award to the union, and, in response to the agency's petition for review, the union alleges that it has established a legal

services program into which the amount awarded will be deposited.

Pursuant to our holding in *Wells* v. *Schweiker*, *supra*, at 7-9, we find that the presiding official erred in awarding market-value fees since appellant's attorney, as a salaried employee, was required to turn her fees over to the union. We find that the appropriate basis for an award of attorney fees in this case is the cost-plus formula, despite the establishment of the legal services fund for receipt of the fee award.

Therefore, the petition for review is hereby GRANTED and the case is REMANDED to the St. Louis Regional Office for determination of the award of attorney fees on a cost-plus basis consistent with *Wells*, *supra*.

Accordingly, the cases of appellants Powell, Overton, Price, and Katherine Peterson are REMANDED to the respective regional offices for further adjudication consistent with this Opinion and Order.

In the case of appellant Catherine Peterson, this is the final order of the Merit Systems Protection Board in that appeal. The addendum decision shall become final five (5) days from the date of this order. 5 C.F.R. § 1201.113 (b).[9]

Appellant Catherine Peterson is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be filed no later than thirty (30) days after appellant's receipt of this order.

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[9] Accordingly, the agency must file proof of compliance with the initial decision with the Office of the Secretary within 20 days of the date of this Order. Any petition for enforcement of this Order shall be filed with the Washington Regional Office in accordance with 5 C.F.R. § 1201.181(a).

FOR THE BOARD:

/s/Kathy W. Semone for
ROBERT E. TAYLOR
Secretary

Jan. 25, 1984
(Date)

Washington, D.C.

APPENDIX C

UNITED STATES OF AMERICA

BEFORE THE
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

Number: DC075209165

IN THE MATTER OF
CATHERINE L. PETERSON

v.

DEPARTMENT OF ENERGY

Date: Oct. 22,1981

ADDENDUM TO DECISION

DECISION

Appellant filed a motion for attorney fees on June 24, 1981, in conjunction with the June 15, 1981 final decision reversing her removal. As the motion was filed within ten days of the final decision, the motion may be entertained. 5 C.F.R. section 1201.37(a)(2) (1980).

The Board's statutory authority for granting attorney fees is set forth in 5 U.S.C. section 7701(g)(1). This section provides:

> A [presiding official] may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the

> employee or applicant is the prevailing party and the Board, administrative law judge, or other employee, as the case may be, determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

Thus, attorney fees may be awarded only if: (1) attorneys fees have been incurred, (2) the appellant was the prevailing party, (3) the award is warranted in the interest of justice, and (4) the fees are reasonable. Appellant has the burden to prove these elements by a preponderance of the evidence. *Allen v. U.S. Postal Service*, MSPB Docket No. AT075299011 at 18 (July 22, 1980); *Spiegel v. Department of the Army*, MSPB Docket No. NY075280109005 at 2 (May 4, 1981); 5 C.F.R. section 1201.56(c)(2).

In find that appellant has incurred attorney fees, as an attorney-client relationship existed pursuant to which counsel rendered legal services on appellant's behalf in conjunction with the appeal. Appellant obtained an attorney through her union, which employs a staff of attorneys to represent members of the bargaining unit. The Board has determined that fees are "incurred" under these circumstances. *O'Donnell v. Department of Interior*, MSPB Dkt. No. NY075299058 at 7-10 (July 22, 1980); *Powell v. Department of Treasury*, MSPB Dkt No. DC075299039 at 7-9 (October 2, 1981).

I find that appellant was the prevailing party in her appeal to the Board, as she sought and obtained the reversal of the action appealed. *See Parker v. Matthews*, 411 Fed. Supp. 1059, 1063 (D.D.C. 1976), *aff'd sub nom. Parker v. Califano*, 561 F.2d 320 (D.C. Cir. 1977).

I find that an award of attorney fees is warranted in the interest of justice. When an agency initiates an action against an employee in bad faith, including a situation

where the agency brings an action to harass an employee, it is in the interest of justice to award attorney fees. *Allen, supra,* at 16-17. In reversing appellant's removal, the Board found that there were mitigating circumstances surrounding appellant's instances of unsatisfactory performance: unusual job tension, harassment, bad faith, malice, and provocation by others. *Peterson v. Department of Energy,* MSPB Dkt. No. DC075209165 at 2 (June 15, 1981). The Board stated:

> Appellant has twelve years of experience as a Clerk-Typist for the Department of Energy and its predecessor agencies. All of appellant's prior service was satisfactory, and three supervisory employees for whom appellant did work testified that they were satisfied with her performance. (H.T. Vol. I at 124; Vol. II at 137-139, 164-165.) One, Mr. Coplon, testified that appellant was a "lifesaver" and that he had made it known to the agency, before appellant was removed, that he would have been pleased to have appellants reassigned to work for him. (H.T. Vol. II at 143.) Apparently, the only supervisor displeased with appellant's performance was Mr. Luber. However, Mr. Luber, the one who proposed her removal, refused to consider reassigning her. (H.T. Vol. I at 125-126.)
>
> The record also indicates that Mr. Luber harassed appellant during the 90-day period that her performance was being evaluated. It shows: (1) that Mr. Luber often "yelled at" appellant (H.T. Vol. II at 42-43); (2) that he "purposely" required her to type a derogatory letter threatening legal action against a "close friend" of hers which is now offered to the Board as an example of appellant's unsatisfactory performance because it contained typographical errors (H.T. Vol. I at 43-45); and (3) that he imposed strict time limits only on appellant's typing assignment, causing her work to be considered "late"

by as little as ten minutes, while other clerk-typists working for Mr. Luber were merely given "action dates" on their assignment. (H.T. Vol. I at 66).[2]

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[2] Appellant's assignments were considered late even though Mr. Luber testified that he was out of the office 25% of the time and spent a considerable amount of time in closed-door meetings, and was not always able to know what time appellant's typing assignments, alleged to be late, were actually completed. (H.T. Vol. II at 88-89.)

Id. at 3. As the Board found that Luber, the official who proposed appellant's removal, harassed appellant in the manner described *supra*, I find that the removal action was initiated in bad faith, and that, therefore, an award of attorney fees is warranted in the interest of justice.

I find that $3526.68 is a reasonable amount for fees and expenses in this case. Appellant claimed $7,300.00 in fees and $54.80 in expenses. The fees were calculated at $50.00 per hour for 146 hours of work. The union's timekeeper stated in an affidavit that the attorney who worked on the case was salaried at the rate of $11.89 per hour during the time she worked on the case. The union asserted that the amount of fees awarded would be deposited in its Legal Services Program, which funds "all union litigation before administrative and judicial tribunals". The agency contended that a reasonable fee could not properly exceed the attorney's actual salary while working on the case plus a prorated share of the overhead cost to the union of providing her services.

The Board stated in *O'Donnell, supra*, at 11, that:

> [A] fee award under the Reform Act must not provide a windfall to counsel at the expense of the public fisc. Accordingly, where it is agreed that a specific fee be paid to counsel for legal services rendered on behalf of an appellant in a case before the Board, we will presume that the amount agreed upon

represents the maximum reasonable fee which may be awarded.

In *O'Donnell, supra,* the union hired a private attorney at less than his normal billing rate to represent a member of the bargaining unit, and the Board awarded the amount billed to the union by the attorney. The Board noted that a reasonable inference could be drawn that the reduced charge to the union was designed to engender an attorney-client relationship with the union mutually beneficial to both parties, and that the amount billed to the union represented the law firm's judgment of the maximum fee that is commercially reasonable under the circumstances. *Id.* at 11 and n.11. However, in the present case, the attorney was a salaried employee of the union, and she was required to turn over to the union any attorney fees recovered. According to the union, the $50.00 per hour fee which it seeks will be deposited into its Legal Services Program. Of that amount, presumably, $11.89 per hour will reimburse the Program for the salary which it paid the attorney, an additional amount will reimburse the Program for overhead expenses incurred in providing legal services to appellant, and the remainder will be used by the Program to fund "all union litigation before administrative and judicial tribunals".

I find that a reasonable fee in this case would properly include the $11.89 per hour attributable to the attorney's salary. Although *O'Donnell* involved payment of fees to a private attorney, this is a distinction without a difference. The important similarities are that both *O'Donnell* and the present case involved: (1) the incurring of expenses by a union to pay an attorney for providing legal services to a member of the bargaining unit, and (2) an agreement between the union and the attorney on a specific amount to be paid for providing those services. *See Powell, supra,* at 14.

A reasonable fee would also properly include an additional amount for the union's overhead expenses in pro-

viding legal services to appellant. *Powell, supra,* at 14. Such expenses were a necessary adjunct to the provision of legal services by the attorney. Like the private attorney in *O'Donnell,* the salaried union attorney required office space, equipment, and supplies, a telephone, secretarial services, and a library in order to properly represent the appellant before the Board. These expenses are estimated as 100% of the attorney's salary, or $11.89 per hour. *Powell, supra,* at 15-16.

However, I do not find that a reasonable fee would include the remaining $26.22 per hour, which will be used to fund "all union litigation before administrative and judicial tribunals". The purpose of 5 U.S.C. section 7701 (g) (1), quoted *supra,* is to authorize reimbursement for the reasonable value of the attorney services performed in a given case. *O'Donnell, supra,* at 9. That purpose does not encompass the funding of other union litigation. As the attorney in *O'Donnell* was in private practice, the reasonable value of his services was determined by what was "commercially reasonable". *Id.* at 11 n.11. However, as the attorney in the present case was a salaried employee of the union, to award a fee greater than the attorney's salary plus overhead would result in an award which goes beyond reimbursement to the union of its actual cost in providing legal services to appellant. *Powell, supra,* at 12. Therefore, the fees awarded in this case will be calculated on the basis of $23.78 per hour ($11.89 per hour salary plus $11.89 per hour overhead).

I find that 146 hours was a reasonable amount of time to spend on the case, in view of the facts that there was a four day hearing, the attorney interviewed 15 witnesses, the case involved an allegation of discrimination, there was a petition for review of the initial decision, and the Office of Personnel Management intervened in the case. *Kling v. Department of Justice,* MSPB Dkt. No. AT075299048 at 10-11 (July 22, 1980). Also, the attorney's hours spent preparing oral and written replies to

the proposal notice were properly included in the fee motion. *See McBride v. Department of Agriculture*, MSPB Dkt. No. SF043209006 (October 16, 1980). I agree with the agency's assertion that the attorney's affidavit should have included the dates on which she performed each element of her services, so that I could scrutinize the hours claimed more closely. However, I do not find this to be a fatal defect, especially because the attorney is no longer employed by the union and the union has no access to her records.

The attorney's claim of $54.80 for photocopying and postage is properly payable, because these reasonable expenses were incidental and necessary expenses incurred in furnishing effective and competent representation. *O'Donnell, supra*, at 12; *Powell, supra*, at 14.

Thus, appellant is entitled to reimbursement for 146 hours at $23.78 per hour ($3471.88) plus $54.80 in costs for a total of $3526.68. However, as fee awards must accrue to counsel, not the appellant, *O'Donnell, supra*, at 10 n.10, the agency should pay the amount awarded to the appropriate counsel.

An issue remains as to the identification of the appropriate counsel. Susan C. Silber was counsel of record from the inception of the case until two days after she filed the motion for attorney fees. Then, she terminated her employment with the union, and the union assigned another attorney to the case. None of the fees claimed are attributable to the work of the newly assigned attorney. Ms. Silber asserts that the fee should be awarded to her, notwithstanding the fact that she is no longer employed by the union, because she was counsel of record during the period covered by the motion for attorney fees. She has agreed on the record to endorse any check for attorney fees over to the union. The union asserts that it is the proper recipient of the fee award, because Ms. Silber has received her salary from the union, and to award the fees to her would constitute unjust enrich-

ment. The union noted that Ms. Silber has neither notified the union of her intention to endorse the check to the union nor entered into a formal arrangement with the union in this regard.

The Board has stated concerning this issue:

> In every instance where request is made for the award of attorney fees, the presiding official must examine the nature of the relationship between the appellant and counsel in order to determine that the counsel will be the recipient of the award. The presiding official must ascertain that the award of the fee is made to the appellant's attorney and not to the appellant individually or to any organization which has paid the fee to counsel. Further, to avoid "double benefits to counsel," an attorney who secures a fee award must repay the client for any fees already received. Attorneys employed by unions or public interest organizations must repay their respective organizations for compensation already received and expenses accrued which would normally be included in an attorney fee. The attorney should agree on the record to reimburse the appellant or organization for the prepayment in whole or in part of the fee awarded.

O'Donnell, supra, at 10 n.10. I find it reasonable to conclude that when the Board made that statement it considered the fact that attorneys do not necessarily work for the same employer for the duration of their careers. Therefore, I find that the statement is applicable in this case.

Accordingly, I find that Susan C. Silber is the appropriate counsel to receive the fee award. She was counsel of record during the period covered by the motion. She will not be unjustly enriched, because she is required and has agreed to endorse the fee award to the union. There is

no requirement in *O'Donnell* that she notify the union of that intention or enter into a formal arrangement with the union in this regard.

The motion for attorney fees and costs is GRANTED to the extent of $3526.68. The agency shall tender payment of this amount to Susan C. Silber within thirty-five (35) calendar days of receipt of this decision.

APPENDIX D

[SEAL]

OFFICE OF THE ATTORNEY GENERAL
Washington, D.C. 20530

February 29, 1980

MEMORANDUM

TO: Solicitor General
Associate Attorney General
Deputy Attorney General
Heads of Litigating Divisions
United States Attorneys

FM: Benjamin R. Civiletti—/s/ BRC
Attorney General

RE: Attorneys' Fees

A few questions have been raised concerning the Department's submission to the D.C. Circuit in *Copeland v. Marshall*, a copy of which was sent to you on December 4, 1979.

In that memorandum to the court, the Department states:

> We do not suggest that utilization of any cost analysis will invariably provide the critical information to determine what is a *reasonable* fee. For example, as we advised the Court at the *en banc* oral argument, in solo practitioner cases the cost-plus formula would not be useful. Moreover, care should be taken that public interest firms are not awarded lower fees because their costs are lower. Regardless of the formula used, fees to these firms and lawyers should be less than would be the case had a for-profit firm brought suit. Strong considerations of public policy require that such firms and lawyers receive fee awards equal to those made to firms

and attorneys at large. *Cf. NTEU v. Nixon*, 172 U.S. App. D.C. 217, 222-23, 521 F.2d 317, 322-23 (1975).

One issue which has been raised is the meaning of or test to apply the terms "public interest firms and lawyers." It is my view that these are broad terms, encompassing private firms and lawyers which engage primarily in public interest law as well as public interest organizations and groups which have law units engaged in public interest law. One way, but not the exclusive one, to determine whether a particular firm meets this test is if it has received tax-exempt status from the Internal Revenue Service.[1]

This definition, and any discussion of it, however, does not determine a reasonable fee. It is, on the contrary, only the beginning of the analysis. When a public interest firm applies for an award of attorneys' fees, the factors enumerated in our memorandum, including cost analysis[2], can be applied to determine a reasonable, but not excessive, fee.

A second issue which has been raised is the effect, if any, of *Anderson v. Department of Treasury*, No. 78-1085 (D.C. Cir. April 20, 1979) on the approach taken by our memorandum in *Copeland*. *Anderson* is a case in which the attorneys seeking an award of legal fees, responding to a question, stated to the court that the fees awarded would be turned over to the union for which

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[1] I have attached a copy of a memorandum on this approach prepared in the Civil Division.

[2] While awards of attorneys' fees to public interest firms do not include a profit, they may include some amount above actual costs (salary and overhead) to compensate a firm for its demonstrated expertise, specialization and resulting efficiency; satisfaction of overhead obligations not directly met by unsuccessful cases; and for development, training or employment of additional personnel for the public interest law work, as provided by the *Evans-Johnson* criteria.

they were working. Referring to an earlier decision and ruling that such a practice would constitute an unauthorized practice of law, the court of appeals held that the attorneys' fees in the case should consist only of the amount the union had agreed to pay the attorneys.[3] While this kind of procedure was not at issue in *Copeland*, the question of who will receive the fee award is likely to arise. The court's concern in *Anderson*, which I share, is that attorneys' fees be used directly for litigation or law purposes. When counsel in *Anderson* stated that their fees would be given to their client, they admitted that the fees would not be used for such purposes.

Public interest law firms or organizations especially may face *Anderson* problems if they do not state or show that an award of fees will be used for law purposes. It may be the case that such a purpose will be obvious since the firm or organization performs no other function. In other situations, such as where counsel seeking attorneys' fees is part of an umbrella public interest organization which commingles its funds, the law purpose to which the attorneys' fees will be applied may have to be shown. Statements on the record by the attorneys in a case may suffice or it may be necessary for counsel to show that a public interest organization has a separate operating account for its law functions.

This memorandum together with the Department's submission in *Copeland* should provide adequate guidance.

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[3] The court of appeals indicated that the attorneys in *Anderson* were under a pre-paid legal services contract with the union. There now seems to be a question of whether this was the case. This factor, however, has no bearing on this discussion.

APPENDIX E

Decisions Sanctioning Market Rate Fees Where Non-Profit Umbrella Lay Organizations Involved

DISTRICT OF COLUMBIA CIRCUIT: *Environmental Defense Fund v. E.P.A.*, 672 F.2d 42 (1982); *Sierra Club v. Gorsuch*, 684 F.2d 972 (1982), *rev'd on other grounds*, —— U.S. ——, 103 S. Ct. 3274 (1983) (Sierra Club and Environmental Defense Fund); *National Association of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319 (1982) (Corporate Accountability Research Group).

FIRST CIRCUIT: *Palmigiano v. Garrahy*, 616 F.2d 598 (1980) (ACLU National Prison Project); *Reynolds v. Coomey*, 567 F.2d 1166 (1978) (NAACP LDF).

SECOND CIRCUIT: *Carey v. New York Gaslight Club*, 598 F.2d 1253 (1979), *aff'd*, 447 U.S. 54 (1980) (NAACP); *Beazer v. New York City Transit Authority*, 558 F.2d 97 (1977), *rev'd on other grounds*, 440 U.S. 568 (1979) (Legal Action Center); *Torres v. Sachs*, 538 F.2d 10 (1976) (Puerto Rican Legal Defense Fund).

THIRD CIRCUIT: *Pawlak v. Greenawalt*, 713 F.2d 972 (1983) (Public Citizen Litigation Group).

FOURTH CIRCUIT: *Tillman v. Wheaton-Haven Recreation Association*, 517 F.2d 1141 (1975) (ACLU).

SIXTH CIRCUIT: *Louisville Black Police Officers Organization v. Louisville*, 700 F.2d 268 (1983) (NAACP LDF); *Northcross v. Board of Education of Memphis*, 611 F.2d 624 (1979), *cert. denied*, 447 U.S. 911 (1980) (NAACP LDF).

SEVENTH CIRCUIT: *Gautreaux v. Chicago Housing Authority*, 690 F.2d 601 (1982) (ACLU); *Mary and Crystal v. Ramsden*, 635 F.2d 590 (1980) (Youth Policy and Law Center).

NINTH CIRCUIT: *Brandenburger v. Thompson*, 494 F.2d 885 (ACLU).

TENTH CIRCUIT: *Ramos v. Lamm*, 713 F.2d 546 (1983) (ACLU); *Love v. Mayor*, 620 F.2d 235 (1980) (ACLU).

DISTRICT COURTS: *Schwabenbauer v. Board of Education*, 515 F. Supp. 33 (W.D.N.Y. 1983) (New York State United Teachers); *National Trust for Historic Preservation v. Corps of Engineers*, 570 F. Supp. 465 (W.D. Ohio 1983); *Allen v. Terminal Transport Co.*, 486 F. Supp. 1195 (N.D. Ga. 1980) *aff'd*, 638 F.2d 1232, *cert denied*, 445 U.S. 989 (1982) (Washington Research Project); *Unemployed Workers Organizing Committee v. Batterton*, 477 F. Supp. 509 (D. Md. 1979) (ACLU Baltimore); *Gunther v. Iowa State Men's Reformatory*, 466 F. Supp. 367 (N.D. Iowa 1979) (Iowa CLU); *Howard v. Phelps*, 443 F. Supp. 374 (E.D. La. 1978) (ACLU); *Harkless v. Sweeney Independent School District*, 466 F. Supp. 457 (S.D. Tex. 1978), *aff'd*, 608 F.2d 594 (5th Cir. 1979) (NAACP LDF); *Keyes v. School District No. 1*, 439 F. Supp. 393 (D. Colo. 1977) (Mexican American Legal Defense and Education Fund, NAACP LDF); *AFGE v. Rosen*, 418 F. Supp. 205 (N.D. Ill. 1976) (American Federation of Government Employees); *ASPIRA of New York, Inc. v. Board of Education*, 65 F.R.D. 541 (S.D.N.Y. 1975) (Puerto Rican Legal Defense and Education Fund), *Consumers Union of the United States v. Board of Governors*, 410 F. Supp. 63 (D.D.C. 1975); *Swann v. Charlotte-Mecklenburg Board of Education*, 66 F.R.D. 483 (W.D.N.C. 1975) (NAACP LDF).

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No. 84-637

In the Supreme Court of the United States

OCTOBER TERM, 1984

CATHERINE PETERSON, PETITIONER

v.

MERIT SYSTEMS PROTECTION BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner, a federal employee, seeks review of a decision of the United States Court of Appeals for the Federal Circuit affirming a decision of the Merit Systems Protection Board (MSPB) that awarded her attorney fees pursuant to 5 U.S.C. 7701(g)(1) based upon the expenses incurred by the union whose staff attorney provided her with legal representation before the MSPB.

1. Petitioner was removed from her position with the Department of Energy. She appealed her removal to the MSPB, and the MSPB reversed in a decision dated June 15, 1981 (Pet. App. 18a-19a). On June 24, 1981, petitioner filed an application for attorney fees in the amount of $7,300.00. The fees requested were calculated at the rate of $50.00 per hour for the 146 hours of work her union-employed attorney devoted to the appeal.

An MSPB presiding official determined (Pet. App. 19a-20a) that petitioner was a "prevailing party," that she had "incurred" attorney fees,[1] and that an award of attorney fees in some amount was "warranted in the interest of justice" under 5 U.S.C.7701(g)(1). However, the presiding official declined to award fees to petitioner's union-employed attorney at the requested "market rate" of $50.00 per hour. Rather, relying upon the MSPB's decision in *O'Donnell* v. *Department of the Interior*, 2 M.S.P.B. 604 (1980), and *Powell* v. *Department of the Treasury*, 8 M.S.P.B. 21 (1981), the presiding official held that the fee should be calculated on the basis of the union attorney's salary, plus an equal amount to cover overhead expenses (Pet. App. 21a-23a). Accordingly, after finding that the 146 hours claimed by petitioner's counsel were reasonably devoted to preparing her appeal, the presiding official awarded attorney fees and costs in the total amount of $3,526.68 (*id.* at 23a-24a).

The presiding official determined that the fee award should be made to the attorney who represented petitioner (and who was employed by petitioner's union) from the beginning of the appeal until two days after the attorney fees motion was filed, when she left her position with the union. This determination was based upon the MSPB's holding in *O'Donnell* v. *Department of the Interior, supra*, that attorney fees must be awarded to individual attorneys and not directly to organizations that employ the attorneys (Pet. App. 25a). Petitioner's former attorney agreed to endorse the check she received for fees and costs over to the union (*id.* at 24a).

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[1]The MSPB has held that attorney fees are "incurred by an employee" if they are incurred on the employee's behalf, even if the employee is not required to pay for them. *O'Donnell* v. *Department of the Interior*, 2 M.S.P.B. 604, 608-610 (1980).

2. Petitioner sought review of the attorney fees award by the full MSPB. She argued that the presiding official erred in computing the fee award on the basis of a cost-plus methodology rather than awarding market rate fees, and she also argued that the fees should have been awarded directly to the union's separate litigation fund rather than to her former attorney (Pet. App. 10a-12a). The MSPB denied the petition for review. It held that the awarding of fees to petitioner's former attorney, rather than to the union's litigation fund, was proper because such awards "avoid[ed] ethical concerns as to whether the organizations, by receiving fee awards, are engaged in the unauthorized practice of law" (Pet. App. 11a). The MSPB further held, based on its decision in *Wells* v. *Schweiker*, 12 M.S.P.B. 329 (1982), that the cost-plus formula utilized by the presiding official was proper. It noted that in *Wells*, it had "declined to treat a union legal services program in the same manner as legal services firms and charitable public-interest organizations for the purpose of awarding market-value attorney fees" (Pet. App. 11a). The Board also found that the reasoning in *National Treasury Employees Union* v. *Department of the Treasury*, 656 F.2d 848, 852 (D.C. Cir. 1981), regarding the ethical problems arising in the award of attorney fees to union-employed counsel, was persuasive "even where the union has established a legal services program" (Pet. App. 12a).[2]

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[2]In *National Treasury Employees Union*, the union sought market rate attorney fees in a case it successfully prosecuted under the Privacy Act of 1974, 5 U.S.C. 552a. It was uncontested that the union compensated the lawyers who represented it at a rate well below the market rate for their services. The court recognized that the union would profit from the legal activities of its lawyers if they were paid the market value of their services (656 F.2d at 852), and it concluded that this result would be inconsistent with ethical rules barring a lawyer from splitting fees with a lay organization or enabling such an organization to engage in the unauthorized practice of law (*id.* at 851-852).

3. Petitioner then sought review of the MSPB's decision in the United States Court of Appeals for the Federal Circuit. In a brief order (Pet. App. 2a), the court of appeals summarily affirmed the decision of the MSPB, relying upon its earlier decision in *Goodrich* v. *Department of the Navy*, 733 F.2d 1578 (Fed. Cir. 1984), petition for cert. pending, No. 84-577. In *Goodrich*, the court below held that the MSPB did not commit legal error or abuse its discretion in basing the award of attorney fees under 5 U.S.C. 7701(g)(1) on the expenses the union incurred in furnishing the services.

4. The court of appeals in this case affirmed the decision of the MSPB on the basis of its prior decision in *Goodrich* v. *Department of the Navy, supra*, and the question presented in the certiorari petition in this case is identical to that presented in *Goodrich*, petition for cert. pending, No. 84-577. For the reasons stated in our brief in opposition in *Goodrich*,[3] the court of appeals correctly determined that the MSPB did not commit legal error or abuse its discretion in basing the award of attorney fees on the expenses actually incurred by the union in furnishing the legal services. That question affects the award of attorney fees only under the special statutory provision, 5 U.S.C. 7701(g)(1), that is applicable to administrative proceedings in adverse action and other routine personnel cases before the MSPB. That narrow issue does not warrant review by this Court.

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[3]We are furnishing counsel for petitioner with a copy of our brief in opposition in *Goodrich*.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

JANUARY 1985

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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REPLY MEMORANDUM FOR THE PETITIONER

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January 1985

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5 U.S.C. 7701(g)(2) 4, 5

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REPLY MEMORANDUM FOR THE PETITIONER

On the basis of its earlier decision in *Goodrich v. Department of the Navy*, 733 F.2d 1578 (Fed. Cir. 1984), the court below affirmed the Merit Systems Protection Board's ruling that awarding market rate attorney's fees to petitioner in accordance with 5 U.S.C. 7701(g)(1), would violate ethical requirements that prohibit the practice of fee-splitting. The government has failed to offer a persuasive reason this Court should not review the court of appeals' decision, in order to resolve an issue of great importance to public sector unions and other non-profit organizations that provide legal representation to persons vindicating important national statutory policies.[1]

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[1] In opposing petitioner's request for review, the government has not filed a separate response brief, but rather relies in whole upon the arguments made in its brief in opposition to the petition for certiorari in *Goodrich v. Department of the Navy*, No. 84-577 (filed October 10, 1984). All references to the government's brief in this case will therefore refer to the Brief for the Respondent in Opposition filed in *Goodrich*.

1. The government seeks to buttress the court of appeals' ruling by recitation of the familiar principle that counsels deference to agency interpretations of the statutes they are charged with administering. Gov. Br. 6-8. The government posits that "[t]he issue of the award of attorney fees in this case is one peculiarly within the competence of the MSPB to resolve." *Id.* at 6.

The deference principle is inapposite here. In limiting petitioner's fee recovery on the basis of ethical requirements, in accordance with its earlier decision in *Wells v. Schweiker*, 12 M.S.P.B. 329 (1982), the MSPB was not engaged in interpretation of the statute it is charged with administering. Instead, in *Wells*, the MSPB interpreted a judicial decision, *National Treasury Employees Union v. Department of the Treasury*, 656 F.2d 848 (D.C. Cir. 1981), which in turn interpreted the code of professional conduct applicable to the legal profession, a wholly separate body of law. The MSPB has no special expertise in determining ethical questions. Its views were therefore entitled to no special deference. *See, Petrou Fisheries, Inc. v. ICC*, 727 F.2d 542, 545 (5th Cir. 1984); *Charter Limousine, Inc. v. Dade County Board of County Commissioners*, 678 F.2d 586, 588 (5th Cir., Unit B, 1982); *H.W. Wilson Co. v. U.S. Postal Service*, 580 F.2d 33, 37 (2d Cir. 1978).[2]

2. In any event, as we explained in our opening brief (Pet. 9-11), the MSPB's interpretation of ethical require-

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[2] The court of appeals did not suggest any deference was due the MSPB's views when it reviewed the MSPB's holding on the ethical question. *See, Goodrich v. Department of the Navy*, 733 F.2d 1578 (Fed. Cir. 1984).

Moreover, the MSPB's decision in *Wells* is not entitled to any special weight because it failed to take account of the D.C. Circuit's subsequent decision in *Jordan v. United States Department of Justice*, 691 F.2d 514 (1982). In that case, the court indicated that the ethical considerations discussed in *NTEU v. Treasury, supra*, would not preclude an award of market rate fees where a separate litigation account was maintained. *Id.* at 516, n.14. *See*, note 3, *infra.*

ments, (and the court of appeals' affirmance), was simply incorrect. While the government's brief strongly (and inappropriately) urges deference to the MSPB, it wholly fails to offer any sound basis for the legal conclusions the MSPB reached. Instead, the government's brief simply restates the question-begging "analysis" of the MSPB in *Wells v. Schweiker*, *supra*, and the court of appeals in *Goodrich*. *See*, Gov. Br. 11-13. Thus, the government merely recites that the union would "indirectly benefit" from a market rate fee and that this would somehow constitute "fee-splitting." But the government fails to respond to our argument that the widespread and heretofore unquestioned practice of depositing fees into a separate fund used solely to finance litigation does not violate the language of the fee-splitting prohibition, and creates none of the dangers the prohibition is designed to prevent. *See*, Pet. 9-11.[3]

3. The government contends that, in any event, the MSPB is free to limit fee recovery in accordance with this interpretation of ethical requirements. It urges that imposition of the putative ethical requirement was merely

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[3] Nor does the government successfully dispel the conflict between the court of appeals' decision here, and the ruling of the D.C. Circuit in *Jordan v. United States Department of Justice*, *supra*. *See*, Gov. Br. 12-13, n.4. It is true, as the government states, that the *Jordan* decision did not make clear the actual financial relationship between the Institute for Public Representation and the attorneys representing the plaintiff, Jordan. But the court took pains to point out that in order to sanction an award of market rate fees to the Institute, in light of *NTEU v. Department of the Treasury*, 656 F.2d 848 (D.C. Cir. 1981), it would have to assume that the Institute maintained a separate fund for litigation. 691 F.2d at 516, n.14. If the *Jordan* court did not decide the separate account would cure any ethical problems, as was first suggested in *NTEU* (656 F.2d at 855), then there would have been no need for it to have mentioned its assumption that such an account existed. Certainly the non-profit legal community could reasonably read the court's language in *NTEU*, and later *Jordan*, as sanctioning the practice of depositing market rate fees in a separate account used solely for litigation.

an exercise of the MSPB's authority to "fill in the gaps" in the statutory scheme of the Civil Service Reform Act. Gov. Br. 8-9.

Congress left no "gap" to be filled by the MSPB concerning the legal standard by which fees were to be awarded. Congress gave the MSPB authority under 5 U.S.C. 7701(g)(1) to determine whether an award was warranted "in the interest of justice." At that point, it directed that the MSPB may issue an award of "reasonable attorney's fees." As we described in our opening brief (Pet. 12-13), this Court explained last term in *Blum v. Stenson*, —— U.S. ——, 104 S. Ct. 1541 (1984), that Congress has uniformly employed this language to denote that prevailing market rates should be awarded, regardless of whether private or salaried in-house counsel represents the prevailing party.[4]

In an attempt to evade the established import of the language Congress employed, and the general rule that market rate fees be awarded, the government has undertaken a search for evidence of Congressional intent to permit departures from the market rate standard in cases involving unlawful personnel actions against federal employees. Unable to find any such evidence in the legislative history of the Civil Service Reform Act, the government relies upon the fact that subsection (g)(2) of 5 U.S.C. 7701 (which governs discrimination cases), specifies that payment of fees under that section will be "in accordance with the standards prescribed under Section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-(k)," while subsection (g)(1) (which governs other prohibited personnel practices) does not so provide. Gov. Br. 9.

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[4] In *Blum*, the Court expressly rejected the argument, suggested again by the government here (Gov. Br. 8, 14), that an award of prevailing market rates to salaried in-house counsel would constitute a "windfall" award. 104 S. Ct. at 1547.

However, as petitioner Goodrich explained in his opening brief (at pp. 9-11), the legislative history surrounding the provisions makes it clear that the inference the government proposes is unwarranted, and that the aberrational result it urges is contrary to Congressional intent. That history shows that the only difference Congress intended to create between the two sections is in the standard for deciding whether or not to award fees, not in the method for calculating fees. Thus, under (g)(1), market rate fees may be awarded under the somewhat narrower "interest of justice" standard, while under (g)(2) they are available under the same circumstances as they would be in actions under the civil rights acts. Nothing in the legislative history suggests that Congress did not intend market rate fees to be available under subsection (g)(1).[5]

4. Contrary to the government's suggestion, (Gov. Br. 14), the court of appeals' ruling here is a far-reaching one that threatens the settled expectations and heretofore established rights of the non-profit legal community to market rate fees under a broad range of statutes. *See*, Pet. 6-7. The immediate and important issue is, of course, the availability of market rate fees under 5 U.S.C. 7701(g)(1) to public sector unions vindicating the merit system principles contained in the Civil Service Reform Act. But the effect of the court of appeals'

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[5] In an unpersuasive attempt to distinguish the policies underlying the award of fees in civil rights cases from the policies underlying the award of fees here, the government boldly asserts that an award of market rate fees is not needed to assure that employees can obtain counsel to represent them in MSPB proceedings. Citing *Vaca v. Sipes*, 386 U.S. 171 (1971), it implies that the union has a legal responsibility to provide attorneys to members who appear before the MSPB. Gov. Br. 10, n.3. This is erroneous. The union has no obligation to supply attorneys to employees in such statutory proceedings, which are not established by the collective bargaining agreement. *See, American Federation of Government Employees, Local 2126, AFL-CIO, San Francisco, California*, 1 F.L.R.A. No. 112, 1 F.L.R.A. 992 (1979).

ruling is much broader than that. Indeed, the government does not deny that in light of its reasoning market rate fees will no longer be available under many statutes, including those protecting civil rights.[6]

Under the decision below and under the goverment's analysis (Gov. Br. 14), courts and even administrative tribunals may deny plaintiffs market rate fees by considering "whether Congress, in determining that fees ordinarily should be awarded on the basis of the prevailing market rate, had overridden the ethical concerns that otherwise would weigh against such arrangement."

We are not aware of, nor has the government cited, a single instance in which Congress has even considered these so-called "established ethical constraints" (Gov. Br. 14) in either the statutory language or legislative history of fee-shifting legislation. Therefore, under the decision below, in the guise of discerning legislative intent, courts and administrative tribunals will be required to make policy judgments properly committed to Congress, *see*, Pet. 13-14, and they may disqualify many plaintiffs from receiving market rate fees, on the basis of non-existent ethical restraints. The effect of the court's ruling can only be to revive the uncertainty this Court seemed to resolve only last term in *Blum*, concerning rights to recover market rate fees under statutory fee provisions.[7]

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[6] In fact the government's brief suggests (at p. 14 and n.6), that despite this Court's apparently clear holding last term in *Blum*, the so-called "ethical concerns" might preclude salaried attorneys of non-legal umbrella organizations (such as the ACLU or NAACP), from recovering market-rate fees under the Civil Rights Attorneys Fees Awards Act.

[7] Indeed, the government has already successfully argued that the *Goodrich* reasoning precludes market rate fees under other statutory provisions. In *Sabey v. United States*, No. 84-83C (Ct. Cl. August 9, 1984), a plaintiff in an action under the Fair Labor Standards Act, 29 U.S.C. 216, who was represented by salaried counsel for a public sector union, was denied market rate fees on the basis of the court's holding in *Goodrich*.

For the reasons stated above and in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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